United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4060

United States Court of Appeals

For the Second Circuit

Docket No. 75-4060

B
P/S

SEMION BRONSZTEJN,

Petitioner,

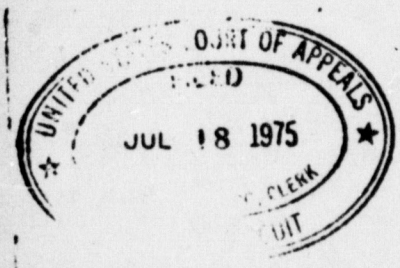
v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition for Review of Order by the
Board of Immigration Appeals

PETITIONER'S BRIEF



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SEMION BRONSZTEJN,

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On Petition for Review of Deportation Order

BRIEF FOR PETITIONER

This is a petition for review under §106(a) Immigration and Nationality Act (8 U.S.C. 1105a) by the petitioner SEMION BRONSZTEJN, of the opinion by the Board of Immigration Appeals, dated November 26, 1974, in which said Board found the petitioner deportable pursuant to §241(a)(11) Immigration and Nationality Act (8 U.S.C. 1251(a)(11)).

Question Presented

The issue in the case is a legal one, namely, whether the petitioner, a lawful permanent resident of the United States, is deportable under §241(a)(11) Immigration & Nationality Act (8 U.S.C. 1251(a)(11)) because he pleaded guilty to Section 110.05 New York Penal Law.[1]

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1. References hereafter will be to sections of the Immigration and Nationality Act unless otherwise indicated.

Statement of Facts

The petitioner, now 25 years old, was born in a portion of Soviet Russia which prior to 1942 was part of Poland. He entered the United States on an immigrant visa August 12, 1964 as a boy of 14, accompanying his parents. In December 1971 he pleaded guilty to "attempted possession of marijuana in the sixth degree." With the exception of this plea which has caused the pending deportation proceedings and has brought him before this court, he has no criminal record.

The administrative record which was certified to this Court does not contain any additional facts about the petitioner.

The Deportation Proceedings

On April 23, 1973 the petitioner was served with an "Order to Show Cause," stating that he was a native of the U.S.S.R., a citizen of Poland and that he was deportable under §241(a)(11) I&NA because on December 13, 1971 he had been convicted for criminal possession of a dangerous drug in the 4th degree, to wit marijuana, in violation of §220.05 and §110 of the New York Penal Law.

A hearing before an immigration judge took place on July 6, 1973. At that time petitioner stated that he understood the judge and the case and that he wanted to go ahead without a lawyer. (App. 35)

The first questionable allegation in the Order to Show Cause appeared to be the petitioner's citizenship. While pleading to the Order to Show Cause the petitioner indicated that the Polish government had refused to issue him a passport and that he therefore did not think he was a citizen of Poland. (App. 36)

As the immigration judge continued to have the petitioner plead to the Order to Show Cause and arrived at statement of fact #5, the trial attorney intervened and announced that that statement was incorrect "because the conviction was not criminal possession but *attempted* criminal possession, Section 220.05 in conjunction with Section 110 of the New York Penal Law."

(App. 37) A recess was called in which an additional, rather than a substitute charge was placed against the petitioner, namely that "he had been convicted for attempted criminal possession of a dangerous drug in the 6th degree, to wit Marijuana. . ." and that he was therefore deportable as charged.

The immigration judge explained to the petitioner that the government is now making "a new allegation, a new claim, and also a new charge of deportability. The difference is very slight (ibid) in both cases, but each item is now a new item in your case in addition to the old item." (App. 38) Because of the "new paper" he was given, the petitioner was told, he could ask for adjournment to obtain counsel, but he again waived right to counsel. The record of conviction was introduced as Exh. 3 and called by the judge "official paper #3." (App. 39) Conviction under §110.05 is a Class B misdemeanor, the lowest category of misdemeanor in the New York Penal Code. It is not clear from the record whether the plea actually referred directly to §220.05 It appears more likely that it related to §110.05 exclusively. Nor does the record clearly show whether sentence was suspended, whether the petitioner was placed on probation or whether he was discharged. In any event he was not sent to jail. Having introduced the criminal record the government rested.

The petitioner was asked by the judge whether he had anything he wished to say or present in opposition of the claim by the government that he was deportable because of the conviction. He responded:

> Well the only reason I could use would be personal reasons. My family is here and both my parents are sick people. My father is sick in the hospital. My parents are very elderly people and my father was just in the hospital. And of course I have brothers and sisters here. I would imagine that is probably the only defense I could use in my case. (App. 39)

After some discussion the petitioner elected Israel, where he had never been, as country of deportation. The government could have designated Poland, the country whence he came and

the country of his present nationality (if he has any), as an alternate country of deportation, but did not do so, reserving the right to reopen the case to designate Poland as alternate country of deportation at a later date.

Decision by the Immigration Judge

The two page opinion of the immigration judge, while commenting on the petitioner's youth and family situation concluded that even though the respondent was not convicted for violation of § 220.05 of the N.Y. Penal Law, but for an attempt to violate that section, this is encompassed by § 241(a)(11).

He concluded that the word "relating to" contained in that provision "is sufficiently broad to include an attempt to unlawfully possess marijuana," citing *Matter of G—*, 6 I&N dec. 353. He ordered the petitioner deported to Israel under § 241(a)(11) "in that you have been convicted of a violation of any law or regulation relating to the illicit possession of marijuana. . ."

Opinion of the Board of Immigration Appeals

The case was appealed and was argued before the Board of Immigration Appeals on January 30, 1974. The Board rendered its opinion on November 26, 1974. The opinion cites many court and administrative decisions, some of which appear unrelated to the present case. Others are relevant and shall be discussed below. However the Board's attempted summary of the position taken by petitioner's counsel indicates a misunderstanding of the argument in several important respects.

The Board suggests that petitioner claims that there was insufficient evidence to support the conviction. That may be so in fact but the position was not taken. Existing precedent makes it clear that collateral attack on a conviction which forms the basis of a deportation order is not permissible.

Petitioner's argument was that a plea of guilty to an *attempted* offense was different, as a matter of *quality*, than a conviction or plea to the substantive offense, that in construing a deportation statute, strict construction would not in all in-

stances cause deportability where the conviction relates to an attempt, even though the completed offense might entail deportability.

A number of citations found in the opinion of the Board of Immigration Appeals appear to have no direct bearing on the issue before this court, but relate to the above mentioned misunderstanding on part of the Board to the effect that the petitioner meant to attack collaterally the conviction in the case. *U.S. ex rel. Zaffarano* v. *Corsi*, 63 F.2d 757 (2 Cir. 1933), *Rassano* v. *INS*, 377 F.2d 971, 974 (7 Cir. 1966), *Cruz-Sanchez* v. *INS*, 438 F.2d 1087 (7 Cir. 1971), all deal with the question that this Court may not go behind the criminal record and review the evidence. The petitioner does not ask the Court to do so.

The Board concluded that petitioner's conviction made him deportable pursuant to §241(a)(11) and rejected remand of the case on the ground that there is no provision in the immigration laws that would permit the respondent any form of discretionary relief, ignoring the possibility which had been raised by the government's position that the case may be reopened for designation of an alternate country of deportation. The appeal was dismissed. This petition for review was filed March 28, 1975.

Subsequent Development

On April 29, 1975, while this petition was awaiting action, the petitioner was served with copy of a motion to reopen the administrative case on the ground that Israel has refused to accept the petitioner and that the government wishes to reopen the proceeding in order to designate Poland as an alternate country for deportation.

Because of the pendency of the petition for review the government has decided to adjourn the motion to the conclusion of this case and in fact if the petitioner should prevail and this Court should agree that he is not deportable the motion would be unnecessary. Its propriety under any circumstances is questioned under 8 CFR 3.2.

Statutes Involved

Immigration and Nationality Act

Sec. 241(a)(11) (8 U.S.C. 1251(a)(11)

Chapter 5–Deportation: Adjustment of Status

GENERAL CLASSES OF DEPORTABLE ALIENS

Sec. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who–

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction forming or addiction-sustaining opiate;

* * *

New York Penal Code

§110.05

An attempt to commit a crime is a:

1. Class B felony when the crime attempted is murder or kidnapping in the first degree;

2. Class C felony when the crime attempted is a Class B felony;

3. Class D felony when the crime attempted is a Class C felony;

4. Class E felony when the crime attempted is a Class D felony;

5. Class A misdemeanor when the crime attempted is a Class E felony;

6. Class B misdemeanor when the crime attempted is a misdemeanor. L. 1965, c.1030, eff. Sept. 1, 1967.[2] c. 112.

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§220.05

A person is guilty of criminal possession in the Fourth degree when he knowingly and unlawfully possesses a dangerous drug.

Criminal possession of a dangerous drug in the Fourth degree is a class A misdemeanor. L.1965, c.1030, eff. Sept. 1, 1967.

SUMMARY OF ARGUMENT

The petitioner respectfully contends:

The Board of Immigration Appeals erred in finding that the plea of guilty to *attempted* possession of marijuana in the sixth degree is covered by § 241(a)(11) I&NA (8 U.S.C. 1251 (a)(11)).

As a matter of statutory construction a provision of the Immigration law which requires mandatory deportation without discretionary relief, no matter what the equities, while the issue does not involve criminal law, should nevertheless be narrowly construed because of the severe consequences to the alien.

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2. Amended L. 1972, c.292 §3; L. 1973, c.276, §12; L. 1974, c.367, §3.

Accordingly if the substantive crime is mentioned in the statute and thus is clearly covered by it, but if an attempt to commit such crime, is not mentioned in the statute, such attempt is not covered by the statute if the elements of the crime do not include criminal intent.

Deportation proceedings should be terminated.

ARGUMENT

Attempted possession of marijuana in the sixth degree is not a violation of a law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana.

1. Deportation Statutes Must be Strictly Construed

Section 241(a)(11) provides that an alien is deportable if he is "convicted of a violation of or a conspiracy to violate any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana."

The statute does not mention "attempted possession." All decisions, administrative and judicial, emphasize that the Congressional intent in formulating the sweeping provision was to stymie the traffic in drugs and that it is not directed against the occasional user.

The U.S. Supreme Court, lower courts, the Board of Immigration Appeals and the Attorney General of the United States (in connection with a recent case pertaining to narcotics, *Matter of Andrade,* Interim Dec. #2276, BIA April 5, 1974, Appendix, p. 6) have said: "Deportation statutes, because of their drastic consequences must be strictly construed. E.g., *Barber* v. *Gonzales,* 347 U.S. 637, 642-643; *Fong How Tan* v. *Phelan,* 333 U.S. 6, 10." For survey of cases with similar rulings see also Gordon & Rosenfield, *Immigration Law and Procedure,* Vol. 1, Sec. 4.1c, pp. 4-7, 4-8.

Not all convictions mentioning possession of narcotics have resulted in a finding of deportability under the Immigration and Nationality Act.

In *Varga* v. *Rosenberg*, 237 F. Supp. 282 (S.D. Cal. 1964), the Court held that an alien who had been convicted under the California statute of being under the influence of narcotics was not subject to deportation under the federal statute providing for deportation of any alien who is convicted of a violation "of any law or regulation relating to illicit possession of narcotic drugs or marijuana."

The petitioner in that case was a citizen of Mexico, admitted to the United States on March 31, 1961 as a permanent resident; on December 9, 1963 he was convicted in the United States of violating the California Health and Safety Code, Section 11721, which prohibited the use of narcotics. An order to show cause was issued against him under §241(a)(11), the same provision under which this petitioner was found deportable. The question before the Court was whether the *use* of narcotics "was related" to illicit possession and thus was covered by §241(a)(11).

The Federal District Court rejected that suggestion with the following reasoning: ". . . while Congress undoubtedly intended to close 'every possible loophole where a person had been convicted of a crime relating to the possession of narcotics,' the legislative history indicates that the Committee's aim was to eliminate traffic in narcotics as distinguished from use." 237 F. Supp. 282 at 284. The Court quoted from the Congressional Committee Report as follows:

> "Drug addiction is not a disease. It is a symptom of a mental or psychiatric disorder. Because contact with a drug is an essential prerequisite to addiction, elimination of drug servility on the part of the addicted persons can best be accomplished by the removal from society of the illicit 'trafficker.' It is to this end that your committee has taken favorable action on H.R. 11619." 1956 U.S. Code, Cong. & Adm. News, p. 3274, et seq., 3281. 237 F. Supp. 282 at 284.
>
> "Congress undoubtedly has aimed its attack upon possession which would give the possessor 'such dominion and control as would have given him the power of dis-

> posal.' The quoted words are borrowed from Toney v. United States, 62 App.D.C. 307, 67 F.2d 573, a case involving the crime of possession of liquor." 237 F. Supp. 282, at 284.

Petitioner *Varga* was convicted for use or being under the influence of narcotics. The Court held that he was not engaged in the traffic in drugs and thus did not have the type of possession which would give him such dominion and control that would include the power of disposition.

The same reasoning, even more forcefully, applies to a conviction of "attempted" possession of Marijuana. In as much as the substantive crime never was completed it is impossible to draw any conclusions as to what might have happened had the petitioner actually succeeded in completing the act of possession. Attempted possession, an offense which is difficult to visualize, implies absolute absence of dominion and control.

The *Varga* rationale has been adopted as the official view of the Immigration Service. See Gordon & Rosenfield, *Immigration Law and Procedure,* 1974 Supplement, p. 4-129, *Note* 35.

In *Matter of Sum,* 13 I&N Dec. 569 (1970), the Board of Immigration Appeals overruled those of its precedents which held that a conviction for unlawful *use* of proscribed drugs makes an alien deportable as one who has been convicted of unlawful possession of such drugs. The Board thus followed the *Varga* decision, *supra,* which had never been appealed by the Solicitor General.

A more recent and even more apposite case is *Matter of Schunck,* Interim Dec. #2137 (1972). In that case the Board of Immigration Appeals ruled that conviction of a violation of §11556 of the California Health and Safety Code, which provides that "it is unlawful to visit or to be in any room or place where any narcotics are being unlawfully smoked or used with knowledge that such activities are occurring" is not a conviction of a law relating to the illicit possession of or traffic in narcotic drugs or marijuana within the meaning of §241(a)(11).

The decisive factor in most of the borderline decisions of the Board was the *intent* or *knowledge* of the defendant that the drugs involved in the case were being used unlawfully or for illegal trafficking.

2. The Board Citations Distinguished

The absence of criminal intent clearly distinguishes the *Bronsztejn* case from *Matter of G—*, 6 I&N Dec. 353 (1954) which was used by the immigration judge in support of his reasoning. That case deals with a plea of guilty to the "crime of an attempt to commit the crime of feloniously possessing a narcotic drug *with the intent to sell.*" At that time possession itself was not a crime and counsel in that case argued that if his client were convicted of possessing, it would not be a ground of deportation and that the conviction of "attempt to gain possession" which is less, should not cause deportability.

The Board rejected this reasoning as follows:

> "The possession involved herein is not mere possession. It is possession *with an intent to dispose of the drug unlawfully*. This is sufficient to bring an alien within the provision of § 241(a)(11) Immigration & Nationality Act." *Matter of G—*, 6 I&N Dec. 654 (Emphasis supplied)

The distinction between *Matter of G—*, and the instant case is obvious. The Board in *Matter of G—*, did not rule on the question whether attempt to gain possession as such came within the range of § 241(a)(11). It ruled that the intent to dispose of a drug unlawfully was of such seriousness as to bring the case within the statute. The present case differs both on the facts and the law. There is no reported adjudication of the legal issue raised by it.

The Board of Immigration Appeals cites a number of decisions which in its opinion establish that attempted possession of marijuana is in fact "related to" possession within the meaning of § 241(a)(11). The cases cited by the Board with the exception of one case which will be discussed in detail below, are easily

distinguishable. All of them deal with an unrelated issue, namely whether where a substantive crime has been found to be a crime involving moral turpitude.under §241(a)(4) an attempt at the same crime also is a crime involving moral turpitude.

Moral turpitude, a concept contained in §241(a)(4) *supra* turns on the intent of the criminal. All the cases cited by the Board are crimes involving "evil intent," which by the Board have been found to be crimes involving moral turpitude. *People* v. *Sullivan,* 173 N.Y. 122, 65 N.E. 989 (1903) – attempted murder; *People* v. *Sobieskoda,* 235 N.Y. 411, 139 N.E. 558 (1923) and *People* v. *Werblow,* 241 N.Y. 55, 148 N.E. 786 (1925) involve grand larceny. See also *U.S. ex rel. Meyer* v. *Day,* 54 F.2d 336 (2 Cir. 1931); *Matter of DeS—,* 1 I&N Dec. 553 (BIA 1943), an attempt to smuggle; *Matter of E—,* 1 I&N Dec. 505 (BIA 1943), attempted compulsory prostitution of women; *Matter of B—,* 1 I&N Dec. 47 (BIA 1941), attempted fraud; *Matter of S—,* 8 I&N Dec. 617 (BIA 1949), attempted arson; *Matter of V—,* 4 I&N Dec. 100 (BIA 1950), bribery.

The Board of Immigration Appeals has consistently held that a crime involving moral turpitude must contain the element of "evil intent." This intent would spill over into the attempted crime as well. The Board has held that where a statute does not require the element of intent, motive or knowledge, it cannot be a crime involving moral turpitude. *Matter of R—,* 4 I&N Dec. 644; *U.S. ex rel. Meyer* v. *Day,* 54 F.2d 336. See also *Matter of Abreu-Semino,* 12 I&N Dec. 775.

The offense of possession of marijuana in the sixth degree does not involve intent and the cases dealing with attempted crimes involving moral turpitude are therefore not applicable even in analogy.

United States of America v. *Rosenson,* 291 F.Supp. 867; 291 F.Supp. 874 (1968), a case cited by the Board which does not involve the Immigration & Nationality Act, nevertheless poses a problem. That case turns on the question whether attempted possession of narcotics under La. Stat. Ann. 14:27 which is punishable by imprisonment for more than one year is

a conviction "related to" narcotics requiring persons convicted thereunder to register with the State Narcotics Board when they enter or leave the country. The U.S. District Court held that it was and this ruling was confirmed in *U.S.* v. *Rosenson*, 417 F.2d 629 (5 Cir. 1969), cert. denied 397 U.S. 962.

The instant case can be distinguished from *U.S.* v. *Rosenson*, *supra* for a number of reasons. Rosenson was a known narcotics dealer and the issues of pushing narcotics and "evil intent" were present in the case. The defendant in that case took the position that since the "attempt" is part of a different statutory provision which does not mention narcotics, it is separate and apart from the narcotics crime. The Court in *Rosenson* rejected this argument. We believe the argument was sound and that the court may be in error. But this petitioner's position is not solely based on the separateness of the attempt statute which exists under New York law as well, but rather on the distinction contained in §241(a)(11) which specifically states a person convicted of a narcotics offense is deportable, but does not specifically include the attempt to commit such an offense.

3. Oliver v. I&NS Distinguished

On May 15, 1975 this Court in *Shirley Ann Oliver* v. *Immigration & Naturalization Service*, Docket #72-2304 (Slip-Sheet pp. 3565-3570) ruled that a plea of guilty to possession of narcotics renders an alien deportable under §241(a)(11), no matter what the equities. But the very reasoning used in reaching this conclusion permits a contrary finding in the instant case.

Mrs. Oliver, a drug addict, had pleaded guilty to "possession" of narcotics and this Court regretfully ruling against her said:

> ". . . If ordinary equal protection standards applied, the statute would seem to be both overinclusive, in respect of offenses (or even lack of offenses) such as those mentioned, and underinclusive in not enumerating e.g. a murder committed more than five years after entry. But the Supreme Court has told us, in a decision where it clearly was under strong temptation to rule otherwise,

> that the validity of distinctions drawn by Congress with respect to deportability is not a proper subject for judicial concern. *Galvan* v. *Press*, 347 U.S. 522, 530-32 (1954). We have been pointed to no decision qualifying what was there decided . . ."

This Court in the *Oliver* case was raising constitutional questions and rejected finding the statute unconstitutional. The petitioner here appeals to the Court to look at his problem not from a constitutional point of view, but from that of statutory construction. This Circuit and a number of others have found it possible where legislation contained sociological or moral judgments which in the course of years have been substantially modified by the standards of the community, to construe certain provisions of the immigration law in a manner which takes note of the changing times.

An example, §101(f) I&NA (8 U.S.C. 1101(f)), provides that a person cannot be regarded as having good moral character where good moral character is a statutory requirement for administrative relief when such person has committed adultery during the period for which good moral character is required.

In *Dickhoff* v. *Shaughnessy*, 142 F.Supp. 535 (S.D.N.Y. 1956) the court found that the statute was not aimed at persons who have committed "technical" adultery, resulting from a remarriage in good faith following an invalid Mexican divorce. This holding thereafter was adopted and followed by the administrative authorities as a correct evaluation of the legislative design. In *Wadman* v. *INS*, 329 F.2d 812 (C.A. 9, 1964) the Court ruled that isolated acts of sexual intercourse by a man whose wife had abandoned him, did not constitute adultery within the meaning of the statute and did not preclude the finding of good moral character. See also *Posusta* v. *U.S.*, 285 F.2d 533 (C.A. 2, 1961).

In *Tutrone* v. *Shaughnessy*, 160 F.Supp. 433 (S.D.N.Y. 1958), a decision which was not appealed by the government, the Court ruled that a person who many years ago was convicted of petty larceny but who today would be treated as a juvenile

offender did not commit a crime involving moral turpitude within the meaning of §241(a)(4). The Court said:

> "The circumstances of the 1914 petty larceny conviction including the relative pettiness of the offense, the age of the defendant and his commitment to the House of Refuge, must be considered in the light of the modern viewpoint of the community. . . ."

It is respectfully submitted that this and other Courts in the land do not necessarily question the validity of distinctions drawn by Congress in its legislation when they recognize as they should that changing concepts in the community influence the construction of the existing statutes without doing violence to them.

The use of marijuana has been legalized in a number of states of the Union and may shortly be legalized in other states.[3] This Court can not ignore the charge of possession of marijuana in those states which will convict persons of the offense because it is explicitly included in the language of §241(a)(11), but taking into consideration the recent developments in the field and the change in public attitudes – without questioning the validity of Congressional standards – it need not extend deportability to "attempted possession" which is not mentioned in the statute, which is a minimal offense, not including either dominance over the subject matter as mentioned in *Varga, supra,* or "intent to traffic" as mentioned in *Matter of G—, supra.*

CONCLUSION

For the foregoing reasons the deportation proceedings against the petitioner should be terminated.

Respectfully submitted,

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3. For most recent discussion of this matter see *Criminal Justice Newsletter,* Vol. 6, #14, July 7, 1975.

ORIGINAL

2 Copies Received

Date July 18, 1975

Firm U.S. Attorney

By Paul J Cushman (DS)

7/18/75